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# In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE MERCHANTS' NATIONAL BANK OF BALTIMORE, APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

## BRIEF FOR THE UNITED STATES.

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Special Attorney.

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*v.*
THE UNITED STATES. } No. 229.

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## BRIEF FOR THE UNITED STATES.

### STATEMENT.

This case is here on appeal from the judgment of the Court of Claims dismissing the petition filed by the Merchants' National Bank of Baltimore, wherein it prayed judgment against the United States on account of the alleged illegal collection of taxes on its circulating notes.

Appellant was first a State bank incorporated by act of the Maryland legislature in 1834. In June, 1865, it was converted into a national bank under the provisions of the "national bank act," and its corporate existence has been duly extended under provisions of law to the present time. From the date of its original authorization in 1865 its capital

stock has been $1,500,000. As such national bank it has always paid the taxes required of it under section 5214, Revised Statutes of the United States.

On or about the 17th day of November, 1904, appellant stated an account, as provided in section 5218, Revised Statutes, and made application to the Secretary of the Treasury for reimbursement of the taxes paid on its circulation during certain periods of its corporate existence when said circulation fell below 5 per cent of its capital stock, which reimbursement was refused by the Secretary. The aggregate tax so paid, for which recovery is asked, amounts to $4,713.01. Five per cent of the chartered capital of said bank is $75,000. The findings show that during certain periods, beginning in January, 1888, and continuing until July, 1904, the circulation of appellant bank fell below $75,000.

The judgment and opinion of the Court of Claims dismissing the petition will be found at Record, pages 7 to 13, inclusive.

THE ISSUES AND STATUTES APPLICABLE THERETO.

The taxes which appellant is seeking to recover were levied and collected by the Treasurer of the United States under section 5214, Revised Statutes, which provides as follows:

> 5214. In lieu of all existing taxes, every association shall pay to the Treasurer of the United States, in the months of January and July, *a duty of one-half of one per centum each half-year upon the average amount of its notes in circulation*, and a duty of one-quarter of one per centum each half-year upon the aver-

> age amount of its deposits, and a duty of one-quarter of one per centum each half-year on the average amount of its capital stock, beyond the amount invested in United States bonds.

Appellant contends that the authority for the requested reimbursement or refundment of the money so collected is found in section 5218 of the Revised Statutes, as follows:

> 5218. In all cases where an association has paid or may pay in excess of what may be or has been found due from it, on account of the duty required to be paid to the Treasurer of the United States, the association may state an account therefor, which, on being certified by the Treasurer of the United States, and found correct by the First Comptroller of the Treasury, shall be refunded in the ordinary manner by warrant on the Treasury.

Appellant further contends that by reason of the provisions of section 3411, Revised Statutes, the collection of said tax was unlawful, whenever its outstanding circulating notes were 5 per cent or less of its chartered or declared capital. Section 3411 reads as follows:

> 3411. Whenever the outstanding circulation of any bank, association, corporation, company, or person is reduced to an amount not exceeding five per centum of the chartered or declared capital existing at the time the same was issued, said circulation shall be free from taxation; and whenever any bank which has ceased to issue notes for circulation deposits in the Treasury of the United States, in

> lawful money, the amount of its outstanding circulation, to be redeemed at par, under such regulations as the Secretary of the Treasury shall prescribe, it shall be exempt from any tax upon such circulation.

It is further urged by appellant that the provisions of section 3411 should be regarded and treated as a proviso in construing and applying section 5214, because of the applicability of the language thereof, and for the further reason, as given by appellant, that section 3411 is made applicable to section 5214 by the act of Congress found in section 3417, Revised Statutes, which latter section reads as follows:

> SEC. 3417. The provisions of this chapter, relating to the tax on the deposits, capital, and circulation of banks, and to their returns, except as contained in sections thirty-four hundred and ten, thirty-four hundred and eleven, thirty-four hundred and twelve (thirty-four hundred and thirteen), and thirty-four hundred and sixteen, and such parts of sections thirty-four hundred and fourteen and thirty-four hundred and fifteen as relate to the tax of ten per centum on certain notes, shall not apply to associations which are taxed under and by virtue of title "National banks."

The contention of the Government is that said section 3411 has no application whatever to the provisions of section 5214; that the tax which was caused to be levied and collected by said last-mentioned section was payable on the average amounts

of the national-bank notes in circulation for each six-month period of the fiscal year, whether that circulation was more or less than five per cent of the capital stock; and further that sections 3410, 3411, and 3416 Revised Statutes should be considered as one piece of legislation as found in the original act.

Section 3410 reads as follows:

> 3410. The capital of any State bank or banking association which has ceased or shall cease to exist, or which has been or shall be converted into a national bank, shall be assumed to be the capital as it existed immediately before such bank ceased to exist or was converted as aforesaid.

In this connection, and as having direct bearing upon the issues in question, we give, for convenience, sections 3412 and 3416, Revised Statutes.

> SEC. 3412. Every national banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, or of any State bank or State banking association, used for circulation and paid out by them.
>
> SEC. 3416. Whenever any State bank or banking association has been converted into a national banking association, and such national banking association has assumed the liabilities of such State bank or banking association, including the redemption of its bills, by any agreement or understanding whatever with the representatives of such State bank or banking association, such national banking association shall be held to make the required

> return and payment on the circulation outstanding, so long as such circulation shall exceed five per centum of the capital before such conversion of such State bank or banking association.

Other statutes are referred to in this discussion, but it is unnecessary to set them out in full.

Sections 3410, 3411, and 3416, standing in Revised Statutes as heretofore given, appear as one piece of legislation of the act of July 13, 1866, and are directed to one purpose, which is entirely separate and distinct from the subject-matter found in section 5214, Revised Statutes.

For the convenience of the court we quote that portion of the act which embraces the subject-matter set forth in said sections 3410, 3411, and 3416, from which may be seen the arrangement of the language in said act:

> That the capital of any State bank of banking association which has ceased or shall cease to exist, or which has been or shall be converted into a national bank, shall be assumed to be the capital as it existed immediately before such bank ceased to exist or was converted as aforesaid; and whenever the outstanding circulation of any bank, association, corporation, company, or person shall be reduced to an amount not exceeding five per centum of the chartered or declared capital existing at the time the same was issued, said circulation shall be free from taxation; and whenever any bank which has ceased to issue notes for circulation shall deposit in the

> Treasury of the United States, in lawful money, the amount of its outstanding circulation, to be redeemed at par, under such regulations as the Secretary of the Treasury shall prescribe, it shall be exempt from any tax upon such circulation; and whenever any State bank or banking association has been converted into a national banking association, and such national banking association has assumed the liabilities of such State bank or banking association, including the redemption of its bills, by any agreement or understanding whatever with the representatives of such State bank or banking association, such national banking association shall be held to make the required return and payment on the circulation outstanding, so long as such circulation shall exceed five per centum of the capital before such conversion of such State bank or banking association.
>
> (See 14 Stat. L., pp. 146–147.)

The foregoing appears in section 9 of said act of July 13, 1866, and is practically a reenactment, with no material change, of the original act as found in section 14 of the act of March 3, 1865 (13 Stat. L., 484), which may be seen on page 9 of the record.

The Government interposes other defenses to which we briefly refer in the argument.

## ARGUMENT.

In seeking to determine the issues here presented it becomes necessary to ascertain the objects and purposes intended by said legislation. If sections

3411 and 5214 are read together and considered as one piece of legislation, or as legislation affecting the same subject-matter, the contention of appellant would seem to possess some merit. Appellant emphasizes the phrase "whenever the outstanding circulation of *any* bank," etc., as it occurs in said section 3411. It is urged in effect that the comprehensiveness of the word "any," makes it necessary that the provisions of said section should be read and applied as a "proviso" to section 5214. (Ap. Br., p. 14.) For practical purposes, then, the law would be as if it read, in substance, as follows:

In lieu of all existing taxes every association (national bank) shall pay to the Treasurer of the United States, in the months of January and July, a duty of one-half of one per centum each half year upon the average amounts of its notes in circulation, provided that if the circulation of a national bank should be reduced to an amount not exceeding five per centum of the chartered capital stock of said association, or bank, then said circulation shall be free from such taxation.

> "A thing may be within the letter of a statute and not within its meaning, and within its meaning but not within its letter. The intention of the lawmaker is the law."
> (*Smythe* v. *Fiske*, 23 Wall., 374–380.)

To this may be added the universally recognized effort of all courts in the construction and interpretation of statutes, namely, that it is the pri-

mary duty and object of the court to ascertain the intention and purpose of the legislative body in the enactment of any legislation which may come before the court for construction and interpretation. If such intention and purpose are clearly set forth in the act, then the statute is said to interpret itself, and needs no interpolation or construction by the court. But if the intention of Congress is not clearly expressed and doubt exists as to the construction intended to be given by the law-making power, then it becomes the province of the court to ascertain the objects and purposes which the legislation was intended to subserve. Furthermore,

> Where doubt exists as to the meaning of a statute, the title may be looked to for aid in its construction. The preexisting law and the reason and purpose of the new enactment are also considerations of great weight. (*Smythe* v. *Fiske*, Ib.)
>
> The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction.
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> * * * * *
>
> The whole doctrine applicable to the subject may be summed up in the single observation

that prior acts may be resorted to, to *solve*, but not to *create* an ambiguity. (*Hamilton* v. *Rathbone*, 175 U. S., 419 and 421.)

Therefore, it is the province of the court, if necessary, to examine the title of the chapter containing the sections under consideration, and resort may be had to the history of the original act to the extent that the court may refer to the journals of the legislative body for the purpose of ascertaining the circumstances and conditions which gave rise to the enactment. And this may be done where the ambiguity refers, not merely to the meaning of particular words, *but to such ambiguity or doubtful meaning as may arise in respect to the general scope and meaning of the statute when all of its provisions are considered.*

The foregoing principles are elementary and universally recognized by the courts and text-book authors and it is unnecessary to collate any great array of decisions or authorities in support of the same. (Endlich on Interpretation of Statutes, sec. 86, p. 115; *United States* v. *Moore*, 95th U. S., 760; *United States* v. *Union Pacific R. R.*, 91st U. S., 72; *Kohlsaat* v. *Murphy*, 96th U. S., 153, 160; *Platt* v. *Union Pacific R. R.*, 99th U. S., 48, 63, 64; *Coosaw Mining Co.* v. *South Carolina*, 144th U. S., 550; *Hamilton* v. *Rathbone*, 175th U. S., 414, 419.)

OBJECT AND HISTORY OF THE LEGISLATION.

When we consider the object and purposes for which section 5214 was originally enacted, it is apparent that Congress has made no exceptions to

the application of said section, or attempted by any legislation to exempt any national bank or association from paying the tax therein provided.

Section 5214, Revised Statutes, is found in chapter 3, entitled "Regulation of the banking business," under Title LXII, designated "National banks," and was taken from section 41, act of June 3, 1864 (national bank act) (13th Stat. L., p. 111). Its purpose and object so far as the tax in question here is concerned was to provide for the expense of engraving and printing the notes of national banks organized under the provisions of the national bank act (*Twin City* v. *Nebecker*, 167th U. S., 196, 203).

Section 5218, Revised Statutes, was originally enacted as separate legislation March 2, 1867 (14th Stat. L., p. 572). Its manifest purpose was to enable the Secretary of the Treasury to disburse money which had been paid into the Treasury, as a tax on circulation, *by mistake*, instead of compelling the bank paying said excessive tax to resort to the courts to secure reimbursement therefor.

The national banking system had its inception in the act of February 25, 1863 (12th Stat. L., 665). The only tax imposed upon the circulation of banks organized and erected under authority of said act was that found in section 19 (Ib., 670), wherein it is provided that for the purpose of reimbursing the Treasury for the expense of printing circulating notes of said banks, a tax of 1 per cent upon the authorized circulation thereof should be levied and collected. There

was no attempt in said act to impose any tax upon the circulation of State banks. This act was superseded and repealed by the act of June 3, 1864 (13th Stat. L., 99), in which the provisions found in section 5214 were originally enacted.

The Congress, having thus provided for a "uniform and stable currency," directed its attention to the subject of State bank circulation, with the view of providing some means whereby the circulating notes of individuals, banks, and associations, issued under authority of State law, should be withdrawn from circulation, and which would cause the discontinuance of such notes as a circulating medium. The plan finally adopted was to tax said notes so heavily that they could not be issued or circulated with profit. The first tax upon State banks so provided was in section 7, act of March 3, 1863 (12th Stat. L., p. 712). In that act, however, the circulation of national and State banks was treated alike as to taxation, the only difference being in the method of collecting the tax.

At the time of the enactment of this legislation the Government was necessitated to raise funds for the purpose of prosecuting the war, and in doing so was forced to take measures providing for the taxation of everything which could be made to yield such revenue, and the legislation was, therefore, distinctly revenue legislation.

In the passage of the act of June 30, 1864, entitled "An act to provide ways and means for the support of the Government and for other purposes" (13 Stat. L.,

218, 277), the tax upon the average circulation of State banks was continued, but by express provision "all associations which are taxed under and by virtue of the act 'to provide a national currency secured by a pledge of United States bonds,'" * * * were exempted from paying said tax.

That was the act of June 3, 1864, heretofore cited. Evidently the Congress realized that this system of taxation would afford an opportunity for the extermination of the troublesome, vexatious, and too often worthless State bank notes.

By this time it had become the policy of Congress to foster the national banks and to prevent, so far as possible, the circulation of the notes of State banks and other associations issued under authority of State laws. Congress did not see fit to effect this by criminal statutes, but by taxation. (*Veazie Bank* v. *Fenno*, 8th Wall., 533, 549; *National Bank* v. *United States*, 101st U. S., 1, 6.)

Sections 3411 and 3417 are found in chapter 8, entitled "Banks and bankers," under Title XXXV, designated "*Internal revenue.*" These sections, as well as their coordinate sections, were brought into the Revised Statutes from the act of June 30, 1864 (13 Stat. L., 218, 277), and certain acts amendatory thereof (13 Stat. L., 469, 686; 14 Stat. L., 146).

As the opinion of the Court of Claims well says, to ascertain the legislative intent and the scope and meaning of section 3411 it is necessary to read it in connection with sections 3410 and 3416. In

the original and amendatory acts from which said sections were taken they constituted but one section. It should also be observed that section 3412, which fixed the amount of tax to be levied on notes used for circulation, preceded the provisions found in sections 3410, 3411, and 3416 in the original act; the latter occurring in section 14 and the former in section 6 thereof. Congress, in proceeding to construct this piece of legislation, built from the ground up. It first provided that "every national banking association, State bank, or State banking association shall pay a tax of ten per centum *on the amount of notes of any person, or of any State bank, or State banking association, used for circulation and paid out by them.*" (Sec. 3412.)

A little later in the work of constructing said act it apparently occurred to the Congressional mind that it would be harsh and unreasonable to tax banks chartered under State laws, or National banks converted from State banks, on the full amount of said circulating medium paid out by them, because inevitably some of the notes so issued and paid out would prove to have been lost, destroyed, or for some reason put beyond the reach of the bank responsible therefor. Whereupon Congress proceeded to provide (sec. 14, original act), in effect. that when 95 per cent of the circulating notes of any State bank, or association, *paid out* by them or by any "converted" national bank had been redeemed or retired, it should not be required to pay the tax of 10 per cent prescribed on the remaining 5 per

cent. In this connection it should be borne in mind that as related to the issue here, only the notes of the State banks or State banking associations which had been assumed by "converted" national banks were subject to the tax of 10 per cent. It never was the intention of Congress to tax such national banks on *their* notes duly issued. This was made plain by subsequent legislation (act of Feb. 8, 1875, 18 Stat. L., 311, secs. 19 and 20). Furthermore, the express provision of section 3417 is to the effect that national banks were exempted from paying *any* of the taxes provided in the sections named, except on the circulation in excess of 5 per cent of the capital stock of the State bank out of which they might have been erected and for whose notes they had assumed responsibility. Appellant owes nothing on that score. It long ago redeemed more than 95 per cent of the notes of the mother bank.

INTENTION OF CONGRESS.

In the able and comprehensive opinion delivered by Judge Booth in the court below, the learned judge says:

> The evolution of the legislation affecting taxes upon the circulation of State banks which we have traced clearly indicates an intention upon the part of the Congress, from and after the passage and successful operation of the national banking act, to retire State bank circulation. (R., pp. 9–10.)

We think it has been clearly demonstrated that is was the legislative intent in the enactment of sec-

tions 6 and 14 of the act of June 30, 1864, now sections 3410, 3411, 3412, and 3416, Revised Statutes, so far as they relate to the subject under discussion, to exempt from taxation on circulation *only* the 5 per cent of *State bank notes* which might be outstanding. This being so, it follows that appellant was bound to pay the tax on its *own* notes without regard to the percentage of its capital stock represented thereby.

As has been suggested, it was the policy of Congress to foster the national banks and to encourage thereby the increase in the circulating medium of the country. In every act of Congress with reference to the subject since the inauguration of the national banking system this policy has been followed. Congress has been seeking all these years, and is still seeking, to encourage the expansion of our national currency in and through national bank circulation. An exemption, such as appellant claims by the remission of the tax of one-half of one per cent levied under section 5214, would be some inducement to national banks to *reduce* their circulation.

Then, again, the tax levied under section 5214, as has been held by this court in the Twin City Bank case (ante), was required not for purposes of revenue, but to provide a fund for the expense of engraving and printing the notes of the national banks. What reason could there be for exempting national banks from the payment of this tax on their circulation when the same might fall to or below 5 per cent of the capital?

The expense of engraving and printing their circulating notes is pro rata as great, perhaps greater, when the circulation is below 5 per cent, as when it far exceeds that amount.

For example, a bank with $1,000,000 capital stock might, under such a construction, if it limited its issue to $50,000, escape without bearing *any* of the expense of preparing said notes for circulation; while a bank with $50,000 capital, which might issue notes to the full amount of its capital stock, would be compelled to bear its pro rata share of the expense of engraving and printing the notes of the larger bank which escapes taxation by reason of its reduced circulation. Congress certainly did not intend that a bank should pay nothing toward the expense of engraving its notes so long as it limited the issue thereof to 5 per cent of the capital stock, and as soon as its issue exceeded 5 per cent, become liable for the tax on the whole amount of issue.

CONTEMPORANEOUS CONSTRUCTION.

For forty years the Treasury Department officials have given to the sections in question the construction for which we here contend. Until about the time the appellant made application to the Treasurer for the refund of the duties or taxes paid, the national banks universally acquiesced in that construction. Such long-continued interpretation and practice by the Treasury officials must have very great weight with the court in determining the con-

struction or application of the sections in question. (*United States* v. *Finnell*, 185 U. S., 236, 244, and cases there cited.)

In the case of *McMichael* v. *Murphy*, after stating that the action of the Land Department under certain statutes relating to public lands had been in line with the views expressed by the court, Mr. Justice Harlan, speaking for the court, said:

> It is our duty not to overrule the construction of a statute upon which the Land Department has uniformly proceeded, in its administration of the public lands, except for cogent reasons. (See 197 U. S. R., p. 312, and cases cited under the foregoing statement.)

The Comptroller of the Currency has at frequent intervals during the period aforesaid published a compilation of laws relating to banking. Prior to the time of the application of appellant in this case for the refund of said taxes, section 5214 and its coordinate sections were published therein under the title "Regulation of banking business," and section 3411 was placed under title "Tax on unauthorized circulation." In the compilation published by said officer in 1905, said sections are brought together under the title "Tax on circulation."

It does not follow, of course, that this change in the method of compiling said publication implied any change in the ruling and practice of the Treasury officials. No reason is apparent for a change in the grouping of these statutes. It can easily be seen how in reading Chapter 4 of the compilation of 1905

one might be led into the erroneous conclusion that section 3411 had some application to section 5214, provided he looked no further; but for the reasons given it is submitted that said section has no such application and is not capable of the construction contended for by the appellant.

In their learned and able brief, appellant's counsel, on page 21 thereof, call attention to the *consequences* resulting from the construction of the statute as given by the court below.

If the construction for which appellant contends be correct, then, without emphasizing the "Doctrine of Inconvenience," it may be sufficient to call to the attention of the court that "There is a presumption against a construction which would render a statute ineffective or inefficient *or which would cause grave public injury or even inconvenience.*" (*Bird* v. *United States,* 187 U. S. R., p. 124.)

As may be seen in the findings, appellant's chartered or capital stock is and always has been $1,500,000. Of practically nearly 7,000 national banks, it may be fair to assume that appellant bank is of more than average importance in the amount of its capital stock. As may further be seen by the findings, 5 per cent of said capital stock amounts to $75,000, and that for various six-month periods from July, 1888, to July, 1904, the average circulation of appellant bank was less than 5 per cent of its capital stock. We may fairly assume, then, that the circulation of the great majority of national banks has at

different times fallen below 5 per cent of their chartered capital.

Already, as shown by the records of the Court of Claims, there have been filed something over 60 petitions of various national banks claiming in the aggregate about $250,000, by reason of the taxes collected under said section 5214; therefore the case at bar may properly be termed a "class case."

Ever since the national-bank act went into effect the taxes provided for in section 5214 have been paid to and disposed of by the Treasury officials as provided by law. The various accounts with the national banks throughout the country have been kept in accordance with the interpretation given to said statutes by the Treasury officials. This interpretation seems to be the most reasonable and in accordance with the intention of the law-making power; and in view of the consequences and inconvenience which would result from the construction contended for by appellant, we believe the court will not disturb the principle upon which the accounting officers have for so many years kept their accounts.

THE STATUTE OF LIMITATIONS AND VOLUNTARY PAYMENT.

For a further defense it is suggested that if the exemption in section 3411, Revised Statutes, does apply to the tax provided by section 5214, Revised Statutes (which application we deny), the claim of appellant for the refund of said tax must fall for two reasons:

First. Because the statute of limitations operates against the claim. If appellant ever had a cause of

action by reason of the taxes collected under section 5214, said cause of action accrued within the meaning of the statute of limitations immediately upon payment of the money into the Treasury, and the bank would, therefore, be barred from recovering all money so paid into the Treasury prior to June 9, 1899, the petition in the court below having been filed June 29, 1905.

Second. Because the payment by appellant of the tax so provided by said section 5214 was a voluntary payment, and if made under a mistake of law, the mistake was mutual and an action for recovery can not be maintained. (*U. S.* v. *Wilson*, 168 U. S., 273; *U. S.* v. *Edmonston*, 181 U. S., 500; Cooley on Taxation, vol. 2, p. 1499.)

It is not alleged, neither does it appear in the record that there was any coercion on the part of the Government and operating upon appellant in the payment of these taxes. No protest, no objection whatever was made to the payment of the money which appellant now seeks to recover.

> Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and can not be recovered back. (*R. R. Co.* v. *Commissioners*, 98 U. S., 543, 544.)

The foregoing is the rule cogently and tersely stated, and is particularly applicable to the case at bar.

In interposing the defense of the statute of limitations and voluntary payment, as well as the argument of inconvenience, we do not wish to be understood as in any sense departing from the conviction we have expressed in the broad principle, namely: That section 3411 has no application to nor connection with said section 5214. All the legislation grouped under the various sections of 3410, 3411, 3412, 3416, and others in connection therewith, belong to a separate and distinct subject-matter, the raising of revenues, and have no application or bearing whatever upon the section under which was paid the money here sought to be recovered.

For the foregoing reasons we respectfully ask that the judgment of the court below be affirmed.

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PHILIP M. ASHFORD,
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